United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17805

845

UNITED STATES OF AMERICA, APPELLANT

v.

RONALD REYES CONVENTO, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
MAX FRESCOLN,
Assistant United States Attorneys.

QUESTION PRESENTED

Where it conclusively appears that Section 329 of the Immigration and Nationality Act of 1952, providing for the expeditious naturalization of alien war veterans, requires the qualifying military service to be immediately subsequent to the contemplated qualifying enlistment, did not the District Court err in granting appellee's petition for naturalization on the theory that appellee's qualifying enlistment (actually a re-enlistment) could occur subsequent to the actual qualifying military service?

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case arose upon a petition for naturalization filed in the District Court of the District of Columbia pursuant to the provisions of Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440 as amended, 75 Stat. 654 (1961) (see App. B 39).

This Court has jurisdiction by reason of Section 1291, Title 28, United States Code. (See Argument I, *infra.*)

STATEMENT OF THE CASE

On November 28, 1961, appellee Rolando Reyes Convento, an alien serving in the United States Navy, filed Petition for Naturalization No. 34083 under Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440 as amended, 75 Stat. 654 (1961) (App. 17).[1] The provision under which

[1] As at the time of filing appellee has not counterdesignated what he wants included in an appendix, appellant cannot make its appendix a joint appendix. In the Appendix, however, appellant has endeavored to include everything that appellee might have included if he had counterdesignated. An Appendix B includes the statutes, rules, and regulations presented.

appellee filed his petition provides for the expeditious naturalization of aliens who have served honorably on active duty in the Armed Forces of the United States during World War I, World War II, ("a period beginning September 1, 1939, and ending December 31, 1945") or the Korean hostilities ("a period beginning June 25, 1950, and ending July 1, 1955"). The provision applies to an alien if "at the time of enlistment or induction" he shall have been in the United States, the Canal Zone, American Samoa or Swains Island, whether or not he had been admitted to the United States for permanent residence, or if at any time subsequent to enlistment or induction such person shall have been lawfully admitted for permanent residence.

On April 18, 1962, the Designated Naturalization Examiner, pursuant to the provisions of Section 335 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1446) (App. B 38) and 8 C.F.R. 335.12, (App. B 41) filed Findings of Fact, Conclusions of Law and Recommendations in the District Court (App. 20). The Examiner found that appellee originally enlisted in the United States Navy in the Philippines on July 17, 1953; that he had served continuously and honorably, in an active duty status, in the Navy since then; and that he re-enlisted in San Diego, California on July 12, 1957. The Examiner found that appellee had never been lawfully admitted to the United States, as a permanent resident, and concluded that he was not eligible for naturalization under Section 329(a)(2). The Examiner found that no enlistment or re-enlistment occurred in the United States, or other geographical area designated by Section 329(a)(1) in connection with any of appellee's service in the Navy during the Korean hostilities, and concluded that he was not eligible for naturalization under that section because, in the case of a person not lawfully admitted to the United States for permanent residence, Section 329(a)(1) quite clearly dictates that some chronological continuity must exist between the inception of a military obligation in the geographical areas designated, and the qualifying service relied upon. The Examiner concluded that appellee was not eligible for naturalization under any other existing provision of the law and recommended that his

petition for naturalization be denied on the ground that he failed to establish eligibility under Section 329(a) (1) or (2) (App. 20–23).

The District Court appointed an Amicus Curiae to prepare a brief for appellee (see App. 30). On November 9, 1962, the court filed its opinion concluding that appellee was eligible for naturalization.[2] The court held that while it was true that appellee's re-enlistment in the United States did not precede the period of military service relied upon, the legislative history of Section 329(a) does not indicate that the enlistment had to precede the qualifying service (App. 29). In conclusion the court said: "It is, therefore, ordered that the petition for naturalization be, and the same hereby is granted" (App. 29). The opinion was not entered in the order book kept by the Clerk of the United States District Court pursuant to Sections 336(a) and 339(e) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1447(a); 8 U.S.C. 1450(e)) (App. B 38, 39).

On November 26, 1962, the court ordered that the petition be granted in its Order of Court on Petition for Naturalization No. 1377–A (App. 31). The appellant's Notice of Appeal was filed January 23, 1963 (App. 32). Appellee has not as yet taken or requested to take his oath of allegiance (App. 19–20).

STATUTES, RULES, AND REGULATIONS INVOLVED

(See Appendix B.)

STATEMENT OF POINTS

1. The court below erred when it concluded that appellee was eligible for naturalization under Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440 as amended, 75 Stat. 654 (1961).

SUMMARY OF ARGUMENT

The appeal lies from the entry of the final order in the order book which the Immigration and Nationality Act of 1952 requires the Clerk of the District Court to maintain. Therefore, the appeal is not premature.

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[2] The Opinion of the Court is reported at 210 F. Supp. 265 (1962).

The District Court erred in holding that the required military service of an alien serviceman petitioning for naturalization pursuant to Section 329 of the Immigration and Nationality Act of 1952 could precede the required enlistment. A fair and natural construction of the statute shows that the enlistment must be the act that commences the qualifying service. Because appellee's enlistment was not made in the United States or any of the other places specified by the statute, he was ineligible for naturalization pursuant to Section 329.

ARGUMENT

I. The Court has jurisdiction to hear the appeal. The appeal is not premature because no oath of allegiance has been administered

There appears to be a jurisdictional question which appellant feels ought to be pointed out to the Court: Is there an appealable order in view of the fact (1) that appellee has not yet taken the oath of allegiance, (2) that Section 336(c) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1447(c)) (App. B 39) provides that "In any case in which the oath is not taken at the time of the final hearing, the petitioner shall not be a citizen of the United States until such oath has been taken," and (3) that Section 337(a) of the Act (8 U.S.C. 1448(a)) (App. B 39) provides that "A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath * * *"? Although under sections 336(c) and 337(a) appellee remains an alien until he takes the oath, the question must be answered in the affirmative.

Jurisdiction of courts of appeals encompasses appeals from "final decisions" of district courts. 28 U.S.C. 1291. Appeals in Naturalization cases are governed by the Federal Rules of Civil Procedure. See Rule 81(a)(2), F.R. Civ. P. (App. B 37). The appeal time in any action runs "from the entry of the judgment appealed from." Rule 73(a), F.R. Civ. P. (App. B 37). While Appellee did not take the oath of allegiance, that fact did not affect the finality of the formal order in this case, Order No. 1377–A, from which appellant appeals. Therefore, the appeal is not premature.

In naturalization cases "the entry of the judgment" contemplated by Rule 73(a) is the entry of the formal order. This seems clear from the face of the Immigration and Nationality Act of 1952. Section 339(e) (8 U.S.C. 1450(e)) requires the clerk of "every naturalization court to cause to be filed in chronological order in separate volumes * * *, and made a part of the records of such court, all declarations of intention and petitions for naturalization." Section 336(a) (8 U.S.C. 1447(a)), provides that "every final order which may be made upon such petition [for naturalization] shall be under the hand of the court and entered in full upon a record kept for that purpose * * *" Thus, the District Court maintains, apart from the records in ordinary civil cases, separate records for naturalization cases, including a set for orders in naturalization cases.

Section 335(d) of the 1952 Act (8 U.S.C. 1446(d)) provides that, when the court approves the Government's recommendations for or against naturalization, the judge shall "enter a written order with such exceptions as the judge may deem proper, by subscribing his name . . . [to the lists of names of persons as to whom naturalization is recommended to be granted or denied] when corrected to conform to his conclusions upon such recommendations." Section 335(d) concludes that "One of each such lists shall thereafter be filed permanently of record in such court. * * *" That provision clearly indicates that the formal order in naturalization cases, once signed, is the final order, whether or not an oath of allegiance has been taken.

The statutes and regulations concerning the naturalization forms indicate the same thing. Section 310(c) (8 U.S.C. 1421(c)) (App. B 37) provides that the Attorney General shall, upon the request of the clerks of naturalization courts, provide "such blank forms as may be required in naturalization proceedings." The naturalization regulations promulgated by the Attorney General pursuant to Section 332(a) of the Act (8 U.S.C. 1443(a)) (App. B 37), provide that "[o]nly such forms as are supplied [by the Immigration and Naturalization Service] shall be used in naturalization proceedings." 8 C.F.R.

332a.1 (App. B 40). Section 332a.2 (App. B 40) of the regulations specifies, *inter alia*, the "only" forms of orders to be used by "clerks of court" in naturalization cases, including Form N–480A (Order of Court Granting Petitions for Naturalization) and Form N–484A (Order of Court Denying Petitions for Naturalization). Section 336.13(a) (App. B 41) of the regulations requires that the Service representative submit to the court, at or prior to the final hearing, "lists and orders of the court, in duplicate, * * * on Forms N–484, N–484A, N–486, N–491, or N–493, as appropriate, for petitions recommended to be denied." Section 336.13(a) concludes that "After the final hearing, and after any required amendments therein have been made, the presiding judge shall sign the orders of the court."

Thus, the formal order No. 1377–A of the District Court was the final order of the case in the District Court and the one which settled the rights of appellee. That appellee has not sworn his allegiance does not lessen the effectiveness of the judicial act of granting his petition.

While Section 336(c) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1447(c)) provides that "In any case in which the oath is not taken at the time of the final hearing, the petitioner shall not be a citizen of the United States until such oath has been taken," and Section 337(a) (8 U.S.C. 1440(a)) provides that "A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath * * *," nothing in those provisions can be construed to mean that the appeal time does not begin to run in a case granting naturalization until after the petitioner has taken the oath of allegiance. Nor does the presence of language that presumes the taking of the oath in one of the printed paragraphs of Form N–484A affect the finality of the judge's formal order. The judge in this case in his formal order No. 1377–A, simply lined out the inapplicable language and added a word in each, the heading and the first printed paragraph (App. 31); and by signing the order in accordance with Section 335(d) of the Immigration and Nationality Act for the permanent record kept by the District Court, finally settled appellee's rights.

Accordingly, the absence of an oath of allegiance is not fatal to a decision of the ultimate issue presented herein. If the District Court erred as a matter of law, as appellant contends, the taking of the allegiance oath would be a void and useless act, so far as the Government is concerned. It could lead to the petitioner being stateless, as he might be expatriated under the law of the country of which he was formerly a citizen by taking an oath of allegiance to this country. Moreover, actual compliance with a judgment or decree has never been necessary to vest appellate jurisdiction. Indeed, such compliance would often render any appeal moot.

II. The District Court erred in holding the required military service could precede the required enlistment granting appellee Convento's petition for naturalization

Appellee does not qualify for naturalization under Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440 as amended, 75 Stat. 654 (1961), because his place of enlistment for the period of service during the Korean hostilities was not in the United States, the Canal Zone, American Samoa, or Swains Island.

Section 329 provides:

> (a) Any person who, while an alien or a noncitizen national of the United States has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. . . .

The position of the words "enlistment or induction" in the first qualifying clause of the provision, following reference to specific periods of qualifying service, shows that the enlistment must be the act that commences the qualifying service.

The legislative history of Section 329(a) gives added proof of the nexus between the enlistment and the qualifying service. Section 329(a) of the Immigration and Nationality Act of 1952 stemmed from Section 324A of the Nationality Act of 1940 [3] which, in turn, stemmed from Section 701 of the Nationality Act of 1940.[4] Section 701 was first added to the nationality laws in 1942 as part of "An act to further expedite the prosecution of the war." After several amendments,[5] Section 701 provided for the expeditious naturalization of

> * * * any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States *during the present war* and who *shall have been at the time of his enlistment or induction a resident thereof* and who (a) was lawfully admitted to the United States, including its territories and possessions, or (b) having entered the United States, including its territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has served, * * * [provided that] the petition shall be filed not later than December 31, 1946 * * * [Emphasis supplied.]

Section 701 covered specific service during World War II. As the statute was wartime legislation with an expiration date, indicating that subsequent re-enlistments were not relevant, and as the words "his enlistment or induction," immediately followed a reference to service "during the present war," by a

[3] Act of June 1, 1948 (62 Stat. 282).

[4] Act of March 27, 1942 (56 Stat. 182, 187).

[5] The act of December 22, 1944 (58 Stat. 886) through the language of clause (b) substantially altered the requirement of the original provision that the alien be lawfully admitted. The filing date was extended by the Act of December 20, 1944 (58 Stat. 827) and again extended to December 31, 1946, by the Act of December 28, 1945 (59 Stat. 658).

fair and natural construction, the clause (a) enlistment must have had to be the one that commenced the qualifying service.

After the expiration of Section 701, new legislation was proposed to allow expeditious naturalization of those aliens who had served in World War II, but who had not taken advantage of the statute. The bill proposed in H.R. 2747, 80th Cong., 1st Sess., to add a new section to the Nationality Act of 1940 to be known as Section 324A, substantively covered what Section 701 had, and carried over the language "his enlistment or induction." H.R. 2747 was not legislatively considered beyond its introduction. However, at the next session of Congress, Mr. Keating, on January 29, 1948, introduced H.R. 5193, 80th Cong., 2d Sess.,[6] which, in its amended form, ultimately became Section 324A of the Nationality Act of 1940.[7] House Report No. 1408, 80th Cong., 2d Sess. on H.R. 5193 contains language showing that Congress intended the provisions of Section 701 to be made permanent legislation by Section 324A. When the phrase "enlistment or induction" was carried over to Section 324A and then to Section 329 of the Immigration and Nationality Act of 1952, its meaning would therefore be the same as in the earlier legislation.

Congress provided an alternative method for those alien war veterans who did not enlist or were not inducted in the United States for the period of qualifying service to gain advantages in the naturalization process. Clause (2) of Section 329(a) provides that they might later be rewarded for wartime service when they do not qualify under clause (1), by subsequent lawful admission to the United States for permanent residence.

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[6] 94 Cong. Rec. 716.

[7] Section 324A in material part provided:

"Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence."

Despite the obvious meaning of "enlistment" in Section 329 (a) from a fair and natural construction of the statute, the District Court concluded that the "enlistment" was not necessarily the act that commenced the qualifying service, but could include a re-enlistment made in the United States after the period of qualifying service (App. 29).[8] In effect, the court was substituting the words "any enlistment" for "enlistment." There is nothing to indicate that Congress, aware of its own legislation permitting enlistments outside the United States, and able to anticipate that some alien war veterans who had not enlisted in the United States might subsequently re-enlist in the United States, intended such an interpretation of the statute. Congress could have included the broad language, but it did not.

In *Villarin* v. *United States,* 196 F. Supp. 589 (D.C.N.D. Calif.), *reversed* 307 F. 2d 774 (9th Cir. 1962), a case on which the District Court relied to support its decision (App. 28–29), the issue was similar to the present one. Villarin had originally enlisted in the Navy in the United States in 1928, was discharged in 1932, and re-enlisted later the same year. He was transferred to the naval reserve in 1937, recalled to active duty in 1941, and served until his discharge in 1947. The District Court ruled that Villarin was not eligible for expeditious naturalization under Section 329(a), for the enlistment which commenced his qualifying service in World War II occurred outside the United States. The 9th Circuit reversed the District Court, holding that the prior enlistment in 1928, though disconnected from the qualifying service, sufficed. No further review was sought by the Government in the case. The decision nonetheless appears to be wrong, for the same reasons the District Court's action in the instant case was wrong: the language of Section 329(a) requires that the enlistment and the qualifying service be related.

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[8] The District Court appeared to believe that denying appellee's petition "would result in the deportation rather than the naturalization of a worthy applicant who has served in our armed forces in time of war" (App. 29). There is no ground for the belief. Appellee is not facing deportation, and there seems to be no legal basis for taking steps towards deportation of an alien while he is in the armed forces of the United States.

It is noteworthy that the Supreme Court in *Tak Shan Fong* v. *United States*, 359 U.S. 102 (1959) did not consider the intention of Congress to reward alien war veterans to be so over-riding that the fair and natural construction of a statute allowing special naturalization benefits to Korean War Veterans could be overcome. The Supreme Court concluded that where a statute * covered alien Korean War Veterans:

> * * * (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, * * *

clause (2) required "a single period of residence commencing with a lawful admission and continuing for a year thereafter." The Court concluded:

> Of course, we must be receptive to the purpose implicit in legislation of this sort, to express the gratitude of the country toward aliens who render service in its armed forces in its defense. But that does not warrant our rationalizing to an ambiguity where fairly considered none exists, or extending the generosity of the legislation past the limits to which Congress was willing to go * * * (*Tak Shan Fong* v. *United States*, *supra*, 107.)

That Supreme Court language should be applied to consideration of Section 329(a) in the instant case. It is apparent that an ambiguity was rationalized by the District Court where fairly considered none exists.

* Act of June 30, 1953 (67 Stat. 106).

CONCLUSION

In view of the above, it is respectfully submitted that when the court below granted appellee's petition for naturalization it was in error.

The order of the court below granting the petition for naturalization should be vacated with directions to enter an order denying the petition.[10]

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
MAX FRESCOLN,
Assistant United States Attorneys.

[10] See 28 U.S.C. 2106; *Kosty* v. *Lewis*, No. 17,229, decided May 23, 1963.

APPENDIX

INDEX TO APPENDIX

APPENDIX

ORIGINAL
(To be retained
by Clerk of Court)

No. 34063

UNITED STATES OF AMERICA

PETITION FOR NATURALIZATION

Filed under Sec. 329

To the Honorable the United States District Court for the Dist. of Col. at Washington, D.C.

This petition for naturalization, hereby made and filed, respectfully shows:

(1) My full, true, and correct name is Rolando Reyes Convento.

(2) My present place of residence is 1729 5th Street, NW., Washington 7, D.C.

(3) My occupation is stewardsmen.

(4) I was born on October 24, 1929, in Rosario, Cavite, Philippines.

(5) My personal description is as follows: Sex, Male; complexion, Dark; color of eyes, Brown; color of hair, Black; height, 5 feet 6 inches; weight, 150 pounds; visible distinctive marks, None; country of which I am a citizen, subject, or national, Philippines.

(6) I am married; the name of my wife or husband is Aurea; we were married on December 20, 1958, at Mapleshade, New Jersey (nee de la Pena) at Arevalollollo City, Philippines, on April 5, 1934 * * * and now resides at with me. * * *

* * * * *

(8) I have 2 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows: Reynold, Male, November 6, 1959 at Maryland, with me; Rolando, Male, November 20, 1960, at Maryland, with me.

(9) My lawful admission * * * in the United States was at San Diego, California, under the name of Rolando Reyes Convento, on July 23, 1957, on the U.S. Navy Aircraft incident to military orders.

(10) Since my lawful admission for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, except as follows:

* * * * *

I entered the U.S. Navy in the Philippine Island under #455 11 06 on July 17, 1953 and have served on continuous active duty since that date, having re-enlisted in San Diego, California on July 23, 1957.

* * * * *

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen.

(12) It is my intention to reside permanently in the United States.

(13) I am not and have not been for a period of at least 10 years immediately preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch, affiliate, or subdivision thereof nor have I during such period believed in, advocated, engaged in or performed any of the acts or activities prohibited by that Act.

(14) I am able to read, write and speak the English language (unless exempted therefrom).

(15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. I am willing, if required by law, to bear arms on behalf of the United States, to perform noncombatant service in the Armed Forces of the United States, and to perform work of national importance under civilian direction (unless exempted therefrom).

(16) I have resided continuously in the United States since July 23, 1957.

(17) I have not heretofore made petition for naturalization * * *.

* * * * * *

(18) Attached hereto and made a part of this, my petition for naturalization, are the affidavits of at least two verifying witnesses required by law.

(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to.....

I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name: SO HELP ME GOD.

Alien Registration No. None.

(S) ROLANDO REYES CONVENTO.

* * * * * *

AFFIDAVIT OF WITNESSES

* * * * * *

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion: SO

HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

(s) ROLANDO REYES CONVENTO

Sworn to (affirmed) in open court, this .... day of ....., A.D. 19..

..... By .....

Clerk *Deputy Clerk.*

* * * * *

Petition granted * * * and Certificate No. ..... issued.

Petition denied: List No. .....

[5/15/62: Findings of fact and Conclusions of Law filed.] *

[1/23/63: Notice of Appeal filed. Copy mailed to Wasserman & Carliner, attys., 1/23/63.]

District Court of the United States for the District of Columbia

Petition No. 34083

PETITION FOR NATURALIZATION OF ROLANDO REYES CONVENTO

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF DESIGNATED NATURALIZATION EXAMINER,

To the Honorable, the Judges of the United States District Court for the District of Columbia:

1. The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 32, who has never been lawfully admitted to the United States for permanent residence, filed the petition for naturalization numbered above on November 28, 1961, under Section 329 of the Immigration and Nationality Act (8 USC 1440), as amended by Section 8 of the Act of September 26, 1961 (75 Stat. 654).

The question presented is whether an enlistment in the United States occurring subsequent to the dates of the Korean

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* Brackets enclosing material in the documents of the Appendix indicate the material was handwritten.

hostility, the period during which the petitioner's service was performed, meets the requirement of Section 329, thereby rendering the petitioner eligible for naturalization under Section 329.

2. The record furnished by the United States Navy establishes that the petitioner originally enlisted in the Navy at Sangley Point, Cavite, Philippine Islands on July 17, 1953; that he has been on continuous, honorable and active duty from that date to the present time; that he has had but one re-enlistment; and that this re-enlistment occurred in San Diego, California on July 12, 1957. The files of the Service reflect that the petitioner has never been admitted to the United States as a lawful permanent resident.

3. Section 329(a) of the Immigration and Nationality Act (8 USC 1440), as amended by Section 8 of the Act of September 26, 1961 (75 Stat. 654), provides that a person who has served honorably in an active duty status in the naval forces of the United States during a period beginning June 25, 1950 and ending July 1, 1955, may be naturalized "if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence; or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence." [Underscoring supplied.]

The petitioner qualifies under Section 329 as one who has had active and honorable service during the Korean hostilities. Moreover, there appears no question but that his "re-enlistment" in San Diego, California is an "enlistment" within the purview of the statute. However, in the case of a person not lawfully admitted to the United States for permanent residence, Section 329(a)(1) quite clearly dictates that some chronological continuity exist between the inception of a military obligation in the geographical areas designated, and the qualifying service relied upon. This position appears fortified by the fact that Section 329(a)(2) provides, alternatively, that an admission for permanent residence "subsequent" to an enlistment or induction will qualify.

In re Naturalization of Villarin (196 F. Supp. 589), where there was an enlistment in the United States in 1928 and World War II service, but interim breaks in service, the court reflected that "the narrower question is whether the enlistment leading to such service was in the United States, and further whether Section 329 requires some nexus between the enlistment in the United States and the alleged qualifying period of service." The court concluded in that case that "Congress must have been referring to the last enlistment before the service in the 'military, air, or naval forces of the United States' the enlistment which provided the occasion for that service."

This petitioner had no enlistment occurring in the United States (or other geographical areas designated) in connection with any service in the United States Navy between June 25, 1950 and July 1, 1955. The enlistment in the United States at San Diego occurred on July 12, 1957, subsequent to the Korean hostility service upon which he relies. This does not meet the dictates of the legislation. As pointed up by the court In Re Naturalization of Villarin (see supra) the statute cannot be extended to cover situations which do not fall fairly within its ambit.

The petitioner's only other enlistment, the enlistment which occurred in the Philippines in 1953 is not qualifying. (Petition for Naturalization of Garces, 192 F. Supp. 439, 440; Petitioner for Naturalization of Mata, 196 F. Supp. 523; In Re Naturalization of Fernandez, 196 F. Supp. 107). The statute is not susceptible of a view embracing a nunc pro tunc conception of the July 12, 1957 re-enlistment.

There is no other existing provision of the law which would permit the petitioner's naturalization on the facts of record. Accordingly, his petition should be denied.

4. Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 U.S.C. 1446) and 8 CFR 335.12, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

(a) That the petitioner is an alien who filed a petition for naturalization on November 28, 1961;

(b) That the petitioner originally enlisted in the United States Navy in the Philippines on July 17, 1953;

(c) That the petitioner has served continuously and honorably, in an active duty status, in the United States Navy from July 17, 1953 to date;

(d) That the petitioner re-enlisted in San Diego, California on July 12, 1957;

(e) That no enlistment, re-enlistment (or induction) occurred in the United States, or other geographical area designated by Section 329(a)(1) of the Immigration and Nationality Act, as amended, in connection with any of petitioner's service in the Navy during the Korean hostilities;

(f) That the petitioner has never been lawfully admitted to the United States as a permament resident.

CONCLUSIONS OF LAW

(a) That the petitioner is not eligible for naturalization under Section 329(a) (1) or (2) of the Immigration and Nationality Act (8 USC 1440) as amended by Section 8 of the Act of September 26, 1961 (75 Stat. 654);

(b) That the petitioner is not eligible for naturalization under any other existing provision of the law.

5. I recommended that this petition for naturalization be denied on the ground that the petitioner has failed to establish eligibility for naturalization under Section 329(a) (1) or (2) of the Immigration and Nationality Act (8 USC 1440), as amended by the Act of September 26, 1961 (75 Stat. 654).

Respectfully submitted,

Helene P. Lawrence,
HELENE P. LAWRENCE,
Designated Naturalization Examiner.

Date Apr. 18, 1962.

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* * * * *

MOTION FOR AMENDMENT OF PETITION * * *

Now comes your petitioner * * * and moves this Honorable Court for amendment of the above numbered Peti-

tion * * * for Naturalization in the following respects: In that Item No. 9 should show the date of my entry into the United States incident to military orders as July 12, 1957; and Item No. 10 should show the date of my re-enlistment as July 12, 1957 in lieu of July 23, 1957.

Date Jun. 18, 1962, .. ROLANDO REYES CONVENTO.
(Signature)

Subscribed and sworn to before me this Jun. 18, 1962, * * * at Washington, D.C.

HELENE P. LAWRENCE.
(Naturalization Examiner)

ORDER OF COURT

The Court being fully advised in the premises and upon motion of the petitioner (applicant) IT IS HEREBY ORDERED that the amendment as prayed for be granted.

By the Court this ..... day of Jun. 19, 1962, * * *.

(s) GEORGE R. HART, Jr.

* * * * *

In the United States District Court for the District of Columbia

Petition No. 34083

PETITION FOR NATURALIZATION OF ROLANDO REYES CONVENTO

OPINION OF THE COURT

The petitioner makes his application for naturalization under Section 329 of the Immigration and Naturality Act of 1952, 8 U.S.C. § 1440, as amended, 75 Stat. 654 (1961), which reads as follows:

> (a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and who, if separated from such service, was separated under honorable con-

> ditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.

The petitioner originally enlisted in the United States Navy for a period of four years at Sangley Point, Cavite, Philippine Islands on July 17, 1953, and he has served continuously and honorably, in an active-duty status, from that date to the present time. The petitioner re-enlisted in the Navy in San Diego, California, on July 12, 1957. The petitioner has never been lawfully admitted to the United States for permanent residence as that phrase is defined in the Act, 8 U.S.C. § 1101 (a)(20), and indeed, the petitioner has little hope for such an admission since he could be so admitted only upon inclusion within the immigration quota for the Philippines, which is very much over-subscribed. The petition for naturalization herein was filed on November 28, 1961.

The Court is thus faced with the problem of whether or not an alien who enlisted in the armed forces of the United States outside the geographical locations specified in the statute, who served honorably during the specified period of the Korean War, and who re-enlisted inside the United States but after the expiration of the time specified in the statute, can be naturalized under the provisions of § 1440. The Naturalization Examiner recommended that the petition for naturalization be denied.

Congress has long seen fit to reward aliens who have served in the armed forces of the United States. At least three such separate provisions can now be found in the United States Code, 8 U.S.C. §§ 1439, 1440, 1440 a-d, and similar provisions have existed in the past.[1] These statutes, however, do not

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[1] 40 Stat. 546 (1918), 44 Stat. 654 (1926), 47 Stat. 165 (1932), 54 Stat. 1149 (1940), 56 Stat. 182, 187 (1942), 56 Stat. 1041 (1942), 62 Stat. 282 (1948), 64 Stat. 316 (1950).

permit naturalization per se; they merely do away with certain requirements which must ordinarily be met. More particularly, with respect to § 1440, there is no age requirement, there is no requirement of a specified period of residence or physical presence in the United States, any court having naturalization jurisdiction may naturalize the petitioner regardless of his residence, and there is no fee or waiting period after filing of a petition. 8 U.S.C. § 1440(b). The statute, as quoted above, does impose alternative additional requirements beyond the basic requisite of service in the armed forces of the United States during the specified time. Since there is no question that the petitioner has served during the Korean War and since the petitioner has not been lawfully admitted to the United States for permanent residence, the question in the present case resolves itself to a consideration of the requirement in § 1440 that "(1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island."

The entire sweep of this country's naturalization laws in this century shows a basic policy of restriction of immigration and a careful screening of those aliens who are admitted for permanent residence with the privilege of eventually becoming naturalized citizens of the United States. This screening process is most often carried out by the mechanism of an "entry" into the United States or one of its territories wherein the alien seeking admission must meet many requirements imposed by Congress and administered by the immigration authorities.[2] This same screening by means of an entry would be satisfied in the case of alien servicemen eligible under § 1440 since an alien who enlisted in the United States, the Canal Zone, American Samoa, or Swains Island would have had to "enter," in the immigration sense of the word, any of those places in order to have been lawfully there.[3] However, § 1440

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[2] For a delineation of the requirements which must be met by an alien seeking to enter the United States see Gordon and Rosenfield, *Immigration Law and Procedure* §§ 2.20–2.50 (1959) Supp. 1961).

[3] Entry into the United States, Puerto Rico, Guam, and the Virgin Islands is governed by the Immigration and Naturalization Act of 1952. See 8 U.S.C. § 1101(a)(38) where "United States" is defined to include all of these territories. Entry into the Canal zone is governed by 35 C.F.R.

seems merely to require physical presence in the United States or the named outlying territories at the time of enlistment or induction. See *Tak Shan Fong* v. *United States*, 359 U.S. 102 at 104 (1959) (dictum). Furthermore, two decisions in the Courts of Appeal have recognized that the necessity for a lawful entry prior to the physical presence at the time of enlistment under § 1440 is an open question. *Petition of Kavadias*, 177 F. 2d 497 (CCA 7, 1949); *United States ex rel. Walther* v. *District Director of Immigration and Naturalization*, 175 F. 2d 693 (CCA 2, 1949). Therefore, Congress seems to have relaxed its usual requirement for a lawful entry or admission to the United States in the statute at issue in this case, § 1440, to this extent: it was satisfied that in most cases there would have had to have been a lawful entry in order for the alien to have been physically present in the United States or one of the enumerated possessions at the time of enlistment, and where the entry giving rise to the presence happened to be unlawful, at least the alien would have enlisted from a place where he was subject to the jurisdiction of the United States.

The petitioner was not present in the United States or one of its outlying possessions at the time of his enlistment and he had thus not entered the United States at that time. However, the petitioner later re-enlisted in San Diego, California. Presumably, although the record does not show it, the petitioner entered the United States prior to that enlistment as a member of the armed forces, since his original four-year enlistment on July 17, 1953, had not expired by the time of his re-enlistment in San Diego on July 12, 1957. Section 284 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1354, provides for the lawful entry into the United States of alien members of the armed forces and several District Courts have held that such an entry sufficiently meets the

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part 10. American Samoa and Swains Island are defined as "outlying possessions of the United States" in 8 U.S.C. § 1101(a)(29). Entry of aliens into these islands was controlled by 22 C.F.R. 53.21–53.41 until the revocation of these regulations on November 14, 1957. 22 Fed. Reg. 9058. These regulations were originally promulgated pursuant to 22 U.S.C. §§ 223, 229, and then under 8 U.S.C. 1185 after the Immigration and Nationality Act of 1952 was passed. 18 Fed. Reg. 489 (1953).

requirements of a "lawful" entry which is specifically required in the aforementioned related statute, 8 U.S.C. § 1440a.[4] Other District Courts have held that admission on a seaman's pass, as per 8 U.S.C. § 1282, similarly meets the requirements for "lawful" admission under § 1440a.[5] It is therefore difficult, in terms of the statutory purpose of § 1440 where the lesser requirement of mere physical presence at the time of enlistment is specified, to see why the petitioner herein has not duly been confronted with and survived the screening the statute was meant to impose on aliens eligible under its terms by his entry into the United States prior to re-enlistment.

The Report of the Designated Naturalization Examiner cited *Petition for Naturalization of Villarin*, 196 F. Supp. 589 (D.C.N.D. Cal., 1961), in support of the recommendation that naturalization be denied the petitioner herein. This case has since been reversed by the Ninth Circuit Court of Appeals (Sept. 11, 1962). The facts therein may shed light on the instant case. Villarin originally enlisted in the Navy in the United States in 1928. He was honorably discharged in 1932 and re-enlisted in the Philippines later that same year. He was transferred to the naval reserve in 1937, recalled to active-duty in 1941, and served until his honorable discharge in 1947. The District Court ruled that Villarin could not be naturalized since his enlistment which began his period of service during World War II was outside the United States; his previous enlistment in the United States was disconnected from that period of service and therefore was of no avail under § 1440. The Court of Appeals ruled this distinction "immaterial," and held that the first enlistment, which took place inside the United States sufficed.

If a prior disconnected enlistment within the United States was sufficient in the *Villarin* case, this Court is of the opinion

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[4] *Petition for Naturalization of Tchakalian*, 146 F. Supp. 501 (D.C.N.D. Cal., 1956; *In re Echiverri*, 131 F. Supp. 674 (D.C. Hawaii, 1955), *Petition for Naturalization of Zaino*, 131 F. Supp. 456 (D.C.S.D.N.Y., 1955). *Contra, In the Matter of D'Auria*, 139 F Supp. 525 (D.C.N.J., 1956).

[5] *Petition for Naturalization of Sing, 163 F. Supp. 922* (D.C.N.D. Cal., 1958); *Petition for Naturalization of Apollonio*, 128 F. Supp. 288 (D.C. N.D.N.Y., 1955). See also *Petition of Bozis*, 70 F. Supp. 5 (D.C.S.D. Cal., 1947).

that the subsequent enlistment in the United States of the petitioner herein, based upon continuous service in our armed forces, suffices in the present case. Moreover, the petitioner's entry into the United States, re-enlistment in the Navy, and petition for naturalization have all been continuous with the period of service during the Korean War on which the petitioner relies. Thus are the cases of *Petition for Naturalization of Hai Guan Han*, 178 F. Supp. 199 (D.C.S.D.N.Y., 1959), and *Petition for Naturalization of Lum Sum Git*, 161 F. Supp. 821 (D.C.E.D.N.Y., 1958), distinguished.

In summary then, the petitioner has had an entry into the United States, which the statute seems designed to require. He has also had substantial contact with and physical presence in the United States and, at the time of re-enlistment, the petitioner was in the United States. Re-enlistment is conceded to be encompassed within the term "enlistment" under the statute. It is true that this re-enlistment did not precede the period of military service relied upon but the Congressional history of § 1440 does not show that military service had to follow the enlistment rather than precede it. In fact the enlistment, service and re-enlistment in the present case are without interruption unlike the *Villarin* case where naturalization was granted despite an enlistment separated from the period of service relied upon by a discharge and return to civilian status. No useful purpose or Congressional policy will be served by denying the petition herein. It would result in the deportation rather than the naturalization of a worthy applicant who has served in our armed forces in time of war. Congress' basic policy of rewarding those aliens who have served the United States in time of war is clear. The statute should be liberally construed in favor of the petitioner's naturalization. *Petition for Naturalization of Sing*, 163 F. Supp. 922 (D.C.N.D. Cal., 1958); *Petition of Augustin*, 62 F. Supp. 832 (D.C.N.D. Cal., 1945). It is, therefore, ordered that the petition for naturalization be, and the same hereby is granted.

The Court wishes to express its deep appreciation to Jack Wasserman, Esquire, for his thorough, illuminating, and able

brief filed in this case as Amicus Curiae at the request of the Court.

(s) GEORGE L. HART, Jr.,
Judge.

Nov. 9, 1962

FORM N-484

List No. 1377

NATURALIZATION PETITIONS RECOMMENDED TO BE DENIED

To the Honorable the United States District Court for Dist. of Columbia sitting at Washington, D.C.,

Helene P. Lawrence, et al., duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary examination the following One (1) petitioners for naturalization and their required witnesses, has found for the reasons stated below, that such petitions should not be granted, and therefore recommends that such petitions be denied.

No.	*Petition No.*	*Name of Petitioner*	*Reason for Denial*
1	34083	Rolando Reyes Convento.	Petitioner has never been lawfully admitted to the United States as a permanent resident and he has failed to establish that, in connection with his Korean War service, he has an enlistment or reenlistment in the geographical areas designated by Section 329 (a) of the Immigration and Nationality Act, as amended.

Respectfully submitted,
Date July 19, 1962.

(s) HELENE P. LAWRENCE

FORM N-484A

ORIGINAL Order No. 1377A

ORDER OF COURT ~~DENYING~~ [ON][b] PETITION FOR NATURALIZATION

Filed Nov. 26, 1962, Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR DIST. OF COLUMBIA AT WASHINGTON, D.C.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Upon consideration of the petition for naturalization recommended to be denied, listed on List No. 1377A, sheet(s) 1 to --, dated June 19, 1962, presented in open Court this 19th day of June, A.D., 1962, IT IS HEREBY ORDERED that each of the said petitions, except those petitions listed below, be, and hereby is, ~~denied~~ [granted.]

IT IS FURTHER ORDERED that the recommendation of the designated examiner is disapproved as to the petitions listed below, ~~and each of said petitioners so listed having appeared in person in open Court this _____ day of _____, 19--, and each having taken the oath of allegiance required by the naturalization laws and regulations, IT IS HEREBY ORDERED that each of them be, and hereby is, admitted to become a citizen of the United States of America.~~

~~IT IS FURTHER ORDERED that prayers for change of name listed below be and hereby are granted, except as to petition(s) No. _____.~~

	Petition No.	*Name of Petitioner*	~~*Change of Name*~~
1	34083	Rolando Reyes Convento	
2			
3			
4			
5			
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See Opinion of Court, filed November 9, 1962.

It is further

ORDERED, that the petition for naturalization be and the same hereby is granted.

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[b] See note [a], *supra*.

~~It is FURTHER ORDERED that petitions listed below be continued for the reasons stated.~~

~~Petition No.~~	~~Name of Petitioner~~	~~Causes of Continuance~~
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3		
4		
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By the Court this ~~19th~~ [26th] day of ~~June~~ [November] 1962.

(s) G. A. HART,
Judge.

United States District Court for the District of Columbia

Petition No. 34083

PETITION FOR NATURALIZATION OF ROLANDO REYES CONVENTO

NOTICE OF APPEAL

Notice is hereby given this 23rd day of January 1963, that the United States of America, hereby appeals to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 26th day of November 1962, in favor of Rolando Reyes Convento against said United States of America.

DAVID C. ACHESON,
United States Attorney.

Copy to: Jack Wasserman; David Carliner, Esquires; Warner Building, Washington, D.C.

APPENDIX B

INDEX TO APPENDIX B

APPENDIX B

Statutes and Rules Involved

Rule 73(a), Federal Rules of Civil Procedure, provides in pertinent part:

> *Appeal to a Court of Appeals.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry * * *

Rule 81(a)(2), Federal Rules of Civil Procedure, provides in pertinent part:

> *Applicability in General.* In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, * * *

Section 310(c), Immigration and Nationality Act of 1952 (8 U.S.C. 1421(c)) provides:

> The courts herein specified, upon request of the clerks of such courts, shall be furnished from time to time by the Attorney General with such blank forms as may be required in naturalization proceedings.

Section 332(a), Immigration and Nationality Act of 1952 (8 U.S.C. 1443(a)) provides in pertinent part:

> The Attorney General shall make such rules and regulations as may be necessary to carry into effect the provisions of this Part * * *

Section 335(d), Immigration and Nationality Act of 1952 (8 U.S.C. 1446(d)) provides:

> The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued, with reasons therefor. In any case in which the recommendation of the Attorney General does not agree with that of the employee designated to conduct such preliminary examination, the recommendations of both such employee and the Attorney General shall be submitted to the court at the hearing upon the petition, and the officer of the Service in attendance at such hearing shall, at the request of the court, present both the views of such employee and those of the Attorney General with respect to such petition to the court. The recommendations of such employee and of the Attorney General shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by such employee or the Attorney General, as the case may be. The judge to whom such recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of each such lists shall thereafter be filed permanently of record in such court and the duplicate of each such list shall be sent by the clerk of such court to the Attorney General.

Section 336(a), Immigration and Nationality Act of 1952 (8 U.S.C. 1447(a)) provides in pertinent part:

> Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, * * *

Section 336(c), Immigration and Nationality Act of 1952 (8 U.S.C. 1447(c)) provides in pertinent part:

> * * * In any case in which the oath is not taken at the time of the final hearing, the petitioner shall not be a citizen of the United States until such oath has been taken.

Section 337(a), Immigration and Nationality Act of 1952 (8 U.S.C. 1448(a) provides in pertinent part:

> A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath * * *.

Section 339(e), Immigration and Nationality Act of 1952 (8 U.S.C. 1450(e)) provides:

> It shall be the duty of the clerk of each and every naturalization court to cause to be filed in chronological order in separate volumes, indexed, consecutively numbered, and made a part of the records of such court, all declarations of intention and petitions for naturalization.

Section 329(a), Immigration and Nationality Act of 1952 (8 U.S.C. 1440(a)), provides:

> Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swain Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall de-

termine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

Title 8, Code of Federal Regulations, Section 332a.1 provides:

> Before exercising jurisdiction in naturalization proceedings, the naturalization court shall direct the clerk of such court upon written application to obtain from the Service, in accordance with section 310(c) of the Immigration and Nationality Act, proper forms, records, books, and supplies required in naturalization proceedings. Such jurisdiction may not be exercised until such official forms, records, and books have been supplied to such court. Only such forms as are supplied shall be used in naturalization proceedings. Where sessions of the court are held at different places, the judge of such court may require the clerk to obtain a separate supply of official forms, records and books for each such place.

Title 8, Code of Federal Regulations, Section 332a.2 provides in pertinent part:

> The following described forms only shall be used by clerks of courts having naturalization jurisdiction, in the exercise of such jurisdiction:
>
> * * * * *
>
> N–480A—Order Of Court (granting petitions)
>
> * * * * *

N–484A—Order Of Court (denying petitions)

* * * * *

Title 8, Code of Federal Regulations, Section 335.12 provides:

> The designated examiner shall, as soon as practicable after conclusion of the preliminary examination, prepare an appropriate recommendation thereon for the court. If the designated examiner is of the opinion that the petition should be denied, or that the petition should be granted but the facts should be presented to the court, he shall prepare a memorandum containing a summary of the evidence adduced at the examination, findings of fact and conclusions of law, and his recommendation as to the final disposition of the petition by the court, and shall before final hearing, in those cases designated by the regional commissioner, submit the memorandum to him for his views and recommendation. No evidence dehors the record or evidence that would not be admissible in judicial proceedings under recognized rules of evidence shall be considered in the preparation of the memorandum. The regional commissioner shall return the designated examiner's memorandum, the record, and any memorandum prepared by the regional commissioner containing his own views and recommendation for presentation to the court.

Title 8, Code of Federal Regulations, Section 336.13(a) provides:

> At or prior to the final naturalization hearing the representative attending the hearing shall submit to the court lists and orders of court, in duplicate, on Forms N–480, N–480A, N–481, N–485, N–490, or N–492, as appropriate for petitions recommended to be granted; on Form N–483 for petitions recommended to be continued; and on Forms N–484, N–484A, N–486,

N–491, or N–493, as appropriate, for petitions recommended to be denied. The regional commissioner's list on Form N–492 or Form N–493, as appropriate, shall be signed by the district director. After final hearing, and after any required amendments therein have been made, the presiding judge shall sign the orders of court.

U.S. GOVERNMENT PRINTING OFFICE: 1969

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17805

CLERK

UNITED STATES OF AMERICA, APPELLANT

v.

ROLANDO REYES CONVENTO, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
MAX FRESCOLN,
Assistant United States Attorneys.

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* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17805

UNITED STATES OF AMERICA, APPELLANT

v.

ROLANDO REYES CONVENTO, APPELLEE

Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT

ARGUMENT

Appellee is Not Eligible to Citizenship Pursuant to Section 328 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1439), Because He is Unable to Comply in All Other Respects With the Requirements of the Immigration and Nationality Act, in That He Has Not Been Lawfully Admitted for Permanent Residence Within the United States, Required by Sections 316 and 318 of the 1952 Act (8 U.S.C. 1427, 1429).

Appellee, in his attempt to demonstrate eligibility for naturalization pursuant to the provisions of Section 328 of the Immigration and Nationality Act of 1952 (8 U.S.C.

1439), ignores the significance of Subsection (b) of Section 328. Subsection (b) provides that a person filing a petition under Subsection (a) of Section 328, which eliminates for alien servicemen who have served honorably in the Armed Forces for three years, the necessity of five years' continuous residence in the United States preceding naturalization, must comply in all other respects, except for three specified exceptions, with the requirements of the Immigration and Nationality Act of 1952. One of the requirements of eligibility for naturalization is that the petitioner be admitted for permanent residence. Section 316(a), Immigration and Nationality Act of 1952 (8 U.S.C. 1427). And Section 318, Immigration and Nationality Act of 1952 (8 U.S.C. 1429), provides that:

> "Except as otherwise provided in this subchapter, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. * * *"

On its face Section 328(b) is a mandate that an alien serviceman must be admitted for permanent residence before he has eligibility for naturalization through three years' honorable service in the Armed Forces.

Again, as with the statute discussed in the earlier brief, Section 329(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1440), appellee is seeking to show an ambiguity in a statute, where, fairly considered, none exists. Appellee's position rests primarily on a statement in the legislative reports that the section eliminating the requirement of five years' continuous residence carried forward substantially the provisions of existing law of the Nationality Act of 1940.[1] (Supp. Br. 4.) Under Section 324 of the Nationality Act of 1940 the petitioner did not need to prove admission for permanent residence because Congress specifically included as exceptions under its Subsection (b) that "(1) no declaration of intention

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[1] 1952 U.S. Code Cong. & Ad. News 1737.

shall be required" and "(2) no certificate of arrival shall be required", and neither of them was available to a petitioner without an admission for permanent residence. Congress, in passing the Nationality Act of 1952, did not see fit specifically to remove the requirement of admission for permanent residence, as it in effect had done in the 1940 Act.[2] It follows that Congress intended that the requirement of permanent residence apply to the petitioners under Section 328. And it follows too that the statement in the legislative reports did not mean that the Act was exactly the same as the 1940 Act, nor did it have the effect of making the law one thing when the statute says it is another.

At the time of the Congressional consideration of the Immigration and Naturalization Act of 1952, the General Counsel of the Immigration and Naturalization Service advised Congress of the possibility of being faced with the contention that under Section 328 of the Act, the petitioner need not have been lawfully admitted to the United States for permanent residence. Appellee refers to this letter to support his theory. (Supp. Br. 4-5.) The General Counsel, while expressing the Service's preference that Congress make a clear expression of its will, nevertheless, pointed out that "[S]ubsection (b) requires compliance with the requirements of Title III (with specified exceptions)." (See Supp. Br. 5.)[3] That Congress

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[2] The Nationality Act of 1940 had no specific requirement of admission for permanent residence such as that required in Sections 316 and 318 of the Immigration and Nationality Act of 1952. Section 307(b) of the 1940 Act (54 Stat. 1142), calling for a declaration of intention, in conjunction with Sections 328, 329, 331(7), and 333(7)(54 Stat. 1151, 1152, 1153, 1154) created the requirement.

[3] That the Immigration and Naturalization Service read Section 328 to require an admission for permanent residence is shown by its regulation that a petitioner under Section 328 "shall establish that he is in the United States pursuant to a lawful admission for permanent residence prior to the filing of the petition for naturalization, whether or not it occurred before or after the service in the armed forces." 8 C.F.R. § 328.1

did not alter the language of Section 328 after receiving that analysis does not diminish the import of Subsection (b)'s requirement of compliance in all other respects with the requirements for naturalization, except for three specific exceptions. On its face, the statute requires proof of admission for permanent residence, so Congress's passage of the section without alteration indicates no support for appellee's proposition that is was the unvoiced intention of Congress to relieve servicemen with three years' honorable service in the Armed Forces of the necessity of being admitted for permanent residence.

If Congress' intention had been what appellee suggests it was, it would never had felt it necessary to extend the provisions of the Lodge Act, the Act of June 30, 1950, 64 Stat. 316, in Section 402(e) of the Immigration and Nationality Act of 1952. (66 Stat. 276) The Act of June 30, 1950, concerns the Naturalization of aliens enlisted in the Regular Army. As amended, it provides in its Section 4 that aliens who serve honorably for five years in the Army may be deemed admitted to the United States for permanent residence within the meaning of Section 329 (a) of the Immigration and Nationality Act (66 Stat. 276).[4] If Section 328 had the effect appellee claims for it, all aliens who were made eligible for naturalization under the Lodge Act, would have been eligible under Section 328,

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[4] Section 402(e) amended the Act of June 30, 1950, as follows:

"Sec. 4. Notwithstanding the dates or periods of service specified and designated in section 329 of the Immigration and Nationality Act, the provisions of that section are applicable to aliens enlisted or re-enlisted pursuant to the provisions of this Act and who have completed five or more years of military service, if honorably discharged therefrom. Any alien enlisted or re-enlisted pursuant to the provisions of this Act who subsequently enters the United States, American Samoa, Swains Island, or the Canal Zone, pursuant to military orders shall, if otherwise qualified for citizenship, and after completion of five or more years of military service, if honorably discharged therefrom, be deemed to have been lawfully admitted to the United States for permanent residence within the meaning of such section 329(a)."

and the Congressional enactment would not have been necessary.[5]

The specific requirement of Subsection (b) of Section 328 relieves the court of any question of reading anything into the statute to require that a petitioner under that section be admitted for permanent residence. Thus, appellee's argument is inapplicable that because Congress specifically imposed the requirement that Armed Forces personnel and seamen petitioning for naturalization under Sections 329 and 330 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1440, 1441) be admitted for permanent residence in order to be eligible for citizenship, the judiciary should not read such a requirement into Section 328 (Supp. Br. 6). That Section 328 allows naturalization "without [the petitioner] having been physically present in the United States for any specified period", in no way suggests, as appellee claims (Supp. Br. 6), that the petitioner need not have been physically present in the United States at all. Certainly, a petitioner would have to be present in the United States to be naturalized at which time he could be admitted for permanent residence if that had not occurred earlier. That language in the provision merely amplifies the Congressional intent that the requirement of five years' continuous residence in the United States for naturalization was not to apply to some alien servicemen.

The regulation which the Immigration and Naturalization Service promulgated in 8 C.F.R. 328.1 makes more explicit what Congress made clear, though it did not specifically state: an alien serviceman seeking naturalization under Section 328 of the Immigration and Nationality Act of 1952 must be admitted for permanent

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[5] In H.R. 2188 accompanying the Act of June 30, 1950, it was the congressional view that:

"If this provision [Section 4] were not included, it would have been necessary for the individual to have been in the United States at the time of his enlistment, or to have been admitted for permanent residence as a quota immigrant." 1950 U.S. Code Cong. & Ad. News 2666.

residence. *Aure* v. *United States*, 225 F.2d 88 (9th Cir. 1955); *In re Naturalization of Fernandez*, 196 F. Supp. 107, 108 (N.D. Cal. 1961). It remains clear therefore, that appellee was not eligible for naturalization under any statute, just as the designated Naturalization Examiner originally concluded.

CONCLUSION

WHEREFORE, it is respectfully submitted that the order of the court below should be vacated with directions to enter an order denying the petition in accordance with the request contained in the Conclusion in appellant's main brief.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
MAX FRESCOLN,
Assistant United States Attorneys.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,805

UNITED STATES OF AMERICA,

Appellant,

v.

ROLANDO REYES CONVENTO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK WASSERMAN
DAVID CARLINER

Warner Building
Washington, D. C.

Attorneys for Appellee.

QUESTIONS PRESENTED

1. Should this Court approve the narrow interpretation of 8 U.S.C. 1440, as amended (Sec. 329 of the Immigration and Nationality Act of 1952) advocated by appellant to the effect that qualifying war service under the statute should immediately follow enlistment in the United States or should the more liberal interpretation of the Court below, Petition for Naturalization of Convento, 210 F. Supp. 265 (D.C. D.C., 1962), and of Villarin v. United States, 307 F.2d 744 (C.A. 9, 1962), be followed?

2. Where an alien enlisted in our naval forces in the Philippine Islands in 1953, reenlisted in the United States in 1957, and has been a member of our Navy continuously from 1953 to date, is he eligible for naturalization under 8 U.S.C. 1440, as amended (Sec. 329 of the Immigration and Nationality Act of 1952) without lawful admission for permanent residence?

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BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of this Court to consider this appeal is asserted by appellee under 28 U.S.C. 1291. A motion to dismiss the appeal upon the ground that it was not filed in time was denied by the Court on August 27, 1963. For the reason set forth in the aforesaid motion, appellee renews his request that the appeal be dismissed.

STATEMENT OF THE CASE

Appellee's petition for naturalization was granted by the District Court pursuant to Section 329 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1440, as amended, 75 Stat. 654). Petition for Naturalization of Convento, 210 F. Supp. 265 (D.C. D.C., 1962) (App. 24). This is an appeal from the District Court's decision and order directing appellee's naturalization.

In accordance with Article 27 of the Military Bases Agreement of March 14, 1947 [1] and the agreement between the United States and the Republic of the Philippines effective December 13, 1952,[2] Filipinos may be enlisted in the United States Navy each year for periods of four to six years. Pursuant to this agreement, appellee, a 32-year-old citizen of the Philippines enlisted in the Navy for four years in the Philippine Islands on July 17, 1953. He served honorably from then until the present time — a period of ten years. On July 12, 1957, appellee reenlisted in California and he is still a member of our naval forces. However, he has never been admitted to the United States for permanent residence.

Appellee sought naturalization pursuant to 8 U.S.C. 1440, as amended. The designated naturalization examiner opposed the petition herein asserting that although appellee had the required service in our armed forces during the period 1950-1955, his failure to acquire permanent residence or to perform such service following an enlistment in the United States precluded naturalization. His reenlistment in the Navy in 1957 while in the United States was said to be an enlistment but was considered ineffective since it followed the prescribed period of service (App. 21).

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1 61 Stat. 4019.

2 State Department Treaties and other International Acts Series 2931.

The District Court ruled on November 9, 1962, that appellee was eligible for naturalization, stating (App. 29):

> "* * * the petitioner has had an entry into the United States, which the statute seems designed to require. He has also had substantial contact with and physical presence in the United States, and, at the time of reenlistment, the petitioner was in the United States. Reenlistment is conceded to be encompassed within the term 'enlistment' under the statute. It is true that this reenlistment did not precede the period of military service relied upon but the Congressional history of § 1440 does not show that military service had to follow the enlistment rather than precede it. In fact the enlistment, service and reenlistment in the present case are without interruption, unlike the Villarin case where naturalization was granted despite an enlistment separated from the period of service relied upon by a discharge and return to civilian status. No useful purpose or Congressional policy will be served by denying the petition herein * * *. It is, therefore, ordered that the petition for naturalization be, and the same hereby is granted."

An appeal to this Court was thereafter filed on January 23, 1963 (App. 32).

STATUTE INVOLVED

Section 329 of the Immigration and Nationality Act of 1952, as amended (75 Stat. 654, 8 U.S.C. 1440) provides:

> "Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and who, if separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swain's Island, whether or not he has been lawfully admitted to the United

> States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence."

SUMMARY OF ARGUMENT

The Designated Examiner conceded below that appellee's reenlistment in the United States in 1957 was an enlistment within the purview of the statute. Appellant cannot now for the first time contend otherwise. Neither Congressional policy nor the demands of the statute support such a restrictive interpretation. Villarin v. United States, 307 F.2d 774 (C.A. 9, 1962).

Appellee's service from 1953 to date qualifies him for naturalization under the statute even though his participation in the Korean hostilities preceded his reenlistment. Tak Shan Fong v. United States, 359 U.S. 102 (1959), does not require a contrary conclusion. There the alien entered the United States illegally and sought naturalization under a different statute. The policy against naturalizing illegal entrants and the statutory history impelled rejection of his citizenship application.

Here, there is no such illegal entry or statutory history. Here, no Congressional policy dictates rejection of appellee's naturalization. On the contrary, considering the spirit of the statute, the policy against reaching absurd results, and the doctrine of liberal construction in favor of naturalization for servicemen, appellee's naturalization should be affirmed. Moreover, this Court should not lightly reject the view of the Ninth Circuit in Villarin v. United States, 307 F.2d 774 (C.A. 9, 1962). The mechanical and restrictive interpretation of the statute urged by the Government would lead to absurd and unjust results. It should be rejected. The decision below should be approved.

ARGUMENT
I

BACKGROUND OF NATURALIZATION LAWS RELATING TO SERVICEMEN

A report of a joint committee of the Attorney General, the Secretary of State, and the Secretary of Labor, stated in 1939 in hearings on H.R. 6127, superseded by H.R. 9980 (76th Cong., 1st Sess.) before the House Immigration and Naturalization Committee, pp. 450-451:

> "Probably the most complex, vague and baffling provisions of the naturalization laws are those which provide for the naturalization of persons by reason of service in the various branches of the military and naval forces of the United States. They were not clear as to their scope prior to the World War, but the legislation hastily enacted during the time the United States was at war proved then and since to be even more difficult of interpretation and construction. So many separate classes were created and so many variations were made as to the proof to be furnished by each class that the precise requirements have not yet been fully determined."

Legislation subsequent to 1939 and the Congressional policy relating to our servicemen is no less complex and difficult to trace than the laws and policy prior to such year.

Under Public Law 144, 65th Congress (40 Stat. 546, 8 U.S.C. 391) enacted on May 9, 1918, a serviceman or veteran of World War I was "relieved of the necessity of proving that immediately preceding the date of his application he has resided within the United States." On May 26, 1926 Congress designated as nonquota immigrants aliens who had honorable military service between April 5, 1917 and November 12, 1918 and authorized their naturalization "if residing in the United States . . . . at any time within two years after the enactment of this Act" (44 Stat. 654, 8 U.S.C. 241).

Under the Act of May 25, 1932 (47 Stat. 165, 8 U.S.C. 241) alien veterans were required to prove two years residence immediately

preceding the naturalization petition pursuant to a legal admission for permanent residence. The Act of June 24, 1935 (47 Stat. 165, 8 U.S.C. 392b) extended the 1932 Act to include certain alien veterans of allied countries.

Section 324(a) of the Nationality Act of 1940 (54 Stat. 1149, 8 U.S.C. 724(a)) authorized naturalization of alien veterans serving in our armed forces at any time for three years without requiring any period of residence or that aliens be in the United States at the time of induction. Native-born Filipinos were specifically included. On March 27, 1942 the Second War Powers Act permitted naturalization for those serving honorably in World War II who were lawfully admitted to the United States and who were residents at the time of enlistment or induction. (56 Stat. 182, 187; 8 U.S.C. 1001-1005; 50 U.S.C. 645).[3]

The Act of December 7, 1942 continued the two-year residence requirement pursuant to a legal admission for permanent residence for veterans of World War I and of the Spanish-American War. (56 Stat. 1041, 8 U.S.C. 723a). On June 1, 1948 section 324A (62 Stat. 282, 8 U.S.C. 724a) was added to the Nationality Act of 1940. It provided for naturalization of veterans of World War I and for those serving between September 1, 1939 and December 31, 1946 provided that they were in the United States or an outlying possession excluding the Philippine Islands at the time of induction or enlistment or were subsequently admitted for permanent residence. The legislative history indicates that this was intended as permanent legislation to cover veterans who served in World War II (House Report 1408, 80th Cong. 2nd Sess., Senate Report 1207, 80th Cong. 2nd Sess.).

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[3] See Naturalization of Aliens in Our Armed Forces, Monthly Review, Immigration and Naturalization Service, September 1943 p. 6 for the naturalization practices under the Second War Powers Act which permitted overseas naturalization of alien military personnel.

The requirement of lawful admission was substantially dispensed with by the Act of December 22, 1944 (58 Stat. 886) for those serving overseas provided they made an entry into the United States prior to September 1943.

On June 30, 1950 the Lodge Act was enacted providing for overseas enlistment of 2,500 aliens for a five-year period and authorizing their naturalization (64 Stat. 316, 8 U.S.C. 724(a)(1)).

The Immigration and Nationality Act of 1952 (66 Stat. 250; 8 U.S.C. 1440a) provides for the naturalization of alien veterans of World War I or those who served between September 1, 1939 and December 3, 1946 if in the United States or its possessions at the time of enlistment or induction or if lawfully admitted for permanent residence. In the reports recommending this provision, the House Immigration Committee stated:

> "Section 329 of the bill also carries forward the provisions of the Nationality Act of 1940 relating to naturalization of those who served honorably in an active-duty status during World War I or World War II. In such cases if induction or enlistment took place in the United States, the Canal Zone, or in an outlying possession, lawful admission for permanent residence is waived, and no period of residence or specified physical presence within the United States is required" House Report 1365, 82d Cong. 2d Sess., p. 79. See also Senate Report 1137, 82d Cong. 2d Sess., p. 42.

Public Law 86 of June 30, 1953 (67 Stat. 108) authorized naturalization of permanent residents or those having been lawfully admitted and having been within the United States for a single period of one year at the time of entry into the Armed Forces during the period between June 24, 1950 and July 1, 1955. Only ninety days of service was required. Upon the basis of the legislative history of the statute, the Supreme Court interpreted this statute as requiring that the lawful admission and physical presence sequence be immediately consecutive. Tak Shan Fong v. United States, 359 U.S. 102 (1959).

On September 26, 1961 (75 Stat. 654) Section 329 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1440a) was amended by extending its provisions to those serving during the Korean hostilities, i.e., the period from June 25, 1950 to July 1, 1955. Under these provisions

veterans are granted naturalization "by elimination of specific periods of residence or physical presence in the United States" House Report 1925, 86th Cong., 2d Sess., p. 2.

The historical background noted above indicates a Congressional policy to permit expeditious naturalization of persons serving in our armed services, to reward those willing to risk their lives by service in our armed services with relaxed naturalization requirements, and to avoid the imposition of extreme technical distinctions to defeat the citizenship applications of worthy alien servicemen. In re Sing's Petition, 163 F. Supp. 922 (D.C. N.D. Cal., 1958); Petition of Agustin, 62 F. Supp. 832 (D.C. N.C. Cal., 1945). At times servicemen were required to show lawful admission for permanent residence,[4] at times lawful admission for temporary or permanent residence,[5] at times any type of entry, lawful or unlawful, sufficed,[6] and at times no entry at all was required.[7] The requirements of residence in the United States have varied from none at all[8] to a period of two years' residence preceding the naturalization petition.[9]

Physical presence in the United States has been required for one year at the time of induction,[10] merely at the time of induction without any prescribed period,[11] and not at all.[12] Subsequent or prior admission for permanent residence[13] has sometimes been required or waived.

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4 Act of May 25, 1932, 47 Stat. 165. Act of December 7, 1942, 56 Stat. 1041.

5 Public Law 86 of June 30, 1953, 67 Stat. 108.

6 Public Law 144 of May 9, 1918, 40 Stat. 546; Second War Powers Act of March 27, 1942, as amended, 56 Stat. 182, 187, 58 Stat. 886.

7 Lodge Act of June 30, 1950, 64 Stat. 316, 8 U.S.C. 724(a)(1).

8 Lodge Act, supra; Act of May 9, 1918, 40 Stat. 546; Section 324(a) of Nationality Act of 1940, 54 Stat. 1149, 8 U.S.C. 1440(a).

9 Act of May 25, 1932, 47 Stat. 165.

10 Public Law 86 of June 30, 1953, 67 Stat. 108.

11 Act of June 1, 1948, 8 U.S.C. 724A, 62 Stat. 282.

12 8 U.S.C. 724(a), 54 Stat. 1149 (Nationality Act of 1940).

13 See Note 12, supra.

The required period of service in the armed forces has varied from no specified time[14] to ninety days,[15] three years,[16] or five years.[17]

On occasions Congress has specifically included native-born Filipinos within the benefits of alien servicemen naturalization legislation (Nationality Act of 1940, 8 U.S.C. 724(a), 54 Stat. 1140), and on other occasions it has specifically noted that presence in the Philippine Islands at the time of induction is not sufficient to bring an alien within its terms.[18] The Philippine Islands were American territory from the Spanish cession in 1898 until final independence in 1946. Barber v. Gonzales, 347 U.S. 637, 639, note 1 (1954).[19]

II

APPELLEE ENLISTED IN THE UNITED STATES

The statute requires honorable service between June 25, 1950, and July 1, 1955, and presence in the United States at the time of enlistment or induction. For the first time on appeal, it is now urged that appellee's reenlistment in the United States in 1957 was not enlistment within the statute (Govt. Brief, p. 10).

The Government is urging a point which was not made below. On the contrary, in the Court below the Designated Examiner, conceded, in conformity with administrative practice of long standing, that (App. 21):

> "* * * there appears no question but that his 're-enlistment' in San Diego, California, is an 'enlistment' within the purview of the statute."

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14 Immigration and Nationality Act, 8 U.S.C. 1440a, 66 Stat. 250.

15 Public Law 86 of June 30, 1953, 67 Stat. 108.

16 Nationality Act of 1940, 54 Stat. 1149, 8 U.S.C. 724(a).

17 Lodge Act of June 30, 1950, 64 Stat. 316, 8 U.S.C. 724(a)(1).

18 Act of June 1, 1948, 62 Stat. 282, 8 U.S.C. 724A.

19 Accordingly, at the time of his birth in 1930 petitioner was a national of the United States and until 1946 he owed allegiance to the United States.

It thus appears that appellant is foreclosed from raising this issue. United States v. Chesapeake & O. R. Co., 215 F.2d 213 (C.A. 4, 1954).

Moreover, Villarin v. United States, 307 F.2d 774 (C.A. 9, 1962), holds that a reenlistment is a qualifying enlistment under the statute. There is neither logic nor any basis whatsoever for concluding that a second or third enlistment should not be considered qualifying under the statute. On the contrary, those who continue in the service of our country's armed forces by reenlistment are definitely deserving of the statute's benefits.

III

APPELLEE'S NAVAL SERVICE QUALIFIES HIM FOR NATURALIZATION

Appellee served in the naval forces of the United States from July 17, 1953, to date. He is still in the service. There is no dispute, as the Designated Examiner concluded below, that (App. 21):

> "The petitioner qualifies under Section 329 as one who has had active and honorable service during the Korean hostilities."

IV

TAK SHAN FONG v. UNITED STATES IS NEITHER APPLICABLE NOR CONTROLLING

Appellant contends that Villarin v. United States, 307 F.2d 774 (C.A. 9, 1962), was incorrectly decided and that Tak Shan Fong v. United States, 359 U.S. 102 (1959), requires reversal of the decision below.

In Tak Shan Fong another statute, Public Law of June 30, 1953 (67 Stat. 108), was involved. A native of China entered the United States as a seaman in 1951. Thereafter he reentered illegally in 1952, was

subjected to deportation proceedings, and served in our armed forces between 1953 and 1955.

Naturalization was authorized for those serving at least 90 days in our armed forces. Lawful admission to the United States and one year's physical presence at the time of entering our armed forces was required.

The Government brief in the Supreme Court reveals opposition to the naturalization of Tak Shan Fong was predicated upon the proposition that an alien illegally in the United States was not entitled to the benefits of Public Law 86. At page 5 of its brief the Government urged that:

> "A totally disconnected and abandoned admission in the past cannot be tacked to an unlawful current physical presence in the United States."

The Supreme Court held on the basis of the legislative history of the statute that he was not entitled to naturalization, stating:

> "* * * Congress was not prepared to allow special naturalization rights to aliens serving at the time of Korea simply if they entered while physically, for any length of time and lawfully or unlawfully, within the United States. Nor was it prepared to make one year's residence alone the condition; it also imposed the requirement of lawful admittance. It would not be meaningful requirement to attribute to Congress if it could have been satisfied by a lawful entry, followed by departure, before and unconnected with the commencement of the year's presence. We believe that Congress must have been referring to the last entry before the year's presence — the entry into the country which provided the occasion for that presence. Cf. Bonetti v. Rogers, 356 U.S. 691."

Tak Shan Fong's case is distinguishable from the case presented here.

1. A different statute was involved. See Villarin v. United States, 307 F.2d 774 (C.A. 9, 1962), noting that the case "is not in

point here." And, as observed by United States v. Universal Corp., 344 U.S. 218, 222 (1952): "The variables render every problem of statutory construction unique."

2. Congressional history was relied upon in Tak Shan Fong by the Supreme Court for the conclusion reached. Here the Congressional history "does not show that military service had to follow the enlistment rather than precede it." (Decision of Judge Hart, App. 29.)

3. Appellee's service was continuous and no attempt is being made to tack on a disconnected enlistment as in Tak Shan Fong.

4. Appellee did not enter the United States unlawfully as did Tak Shan Fong and deportation proceedings have not been instituted against him.[20] No policy against granting citizenship to illegal entrants is here involved.

The background of the cases factually, statutorily and legally are therefore distinguishable.

Villarin v. United States, 307 F.2d 776 (C.A. 9, 1962), involved an alien who originally enlisted in 1917 and thereafter reenlisted in 1928 in the United States. In 1932 he reenlisted in the Philippines and served until 1937. In 1941 he was recalled and he then served until 1947. The District Court denied naturalization under the statute here involved because he was not in the United States at the time of his 1932 reenlistment, 196 F. Supp. 589 (D.C. N.D. Cal., 1961). The Court of Appeals reversed, holding Villarin eligible for naturalization. Tak Shan Fong, arising under a different statute, was found not in point.

As the Court below observed (App. 28-29):

> "If a prior disconnected enlistment within the United States was sufficient in the Villarin case, this Court is of the opinion that the subsequent

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20 If naturalization is not granted, upon his release from service, deportation will be instituted against appellee upon the ground that he remains in the United States longer than permitted.

> enlistment in the United States of the petitioner, based upon continuous service in our armed forces, suffices in the present case."

V

NEITHER CONGRESSIONAL POLICY NOR THE STATUTE REQUIRE THE RESTRICTIVE INTERPRETATION URGED BY APPELLANT

Appellant would restrict the word enlistment to exclude reenlistment. No Congressional policy or purpose is urged to support this view. Similarly, appellant would preclude application of the instant statute to one who reenlisted in the United States after or during the completion of the service specified by the statute. As we will show below, there is neither Congressional policy nor purpose to support the Government's view.

In Richards v. United States, 369 U.S. 1, 11 (1962), the Supreme Court said:

> "We believe it is fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation we must not be guided by a single sentence, or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

Ozawa v. United States, 260 U.S. 178, 194 (1922), reminds us that:

> "We may then look to the reason for the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

United States v. American Trucking Assoc., 310 U.S. 534, 543, 544 (1939), repeats:

> "When the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as

> a whole' this Court has followed that purpose, rather than the literal words."

International Longshoremen's & Warehouse Union v. Juneau Spruce Corp., 342 U.S. 237, 243 (1951), pithily restates the principle that:

> "* * * literalness is no touchstone of legislative purpose."

Cabell v. Markham, 148 F.2d 737 (C.A. 2, 1945), declares:

> "Courts have not stood helpless in such situations, the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute.
>
> ********
>
> "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Affirming, the Supreme Court states in Markham v. Cabell, 326 U.S. 404, 409 (1945):

> "The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as Church of the Holy Trinity v. United States, 143 U.S. 451, 36 L. ed. 226, 12 S. Ct. 511 illustrates."

Judge Fahy observed in Richmond F. & P. R. Co. v. Brooks, 91 App. D.C. 24, 197 F.2d 404, 407 (C.A. D.C., 1952), cert. denied 344 U.S. 828:

> "The literal reading of the applicable provision is not necessarily the correct one. In addition to analyzing the language used as a guide to decision, the policy and spirit of the law must be heeded."

To the consideration that a statute should be given a reasonable construction to avoid an absurd result and the principle that "the spirit of the statute governs the letter," 3 Sutherland, Statutory Construction, pp. 137, 138, 140, should be added the doctrine of liberal construction in favor of naturalization favored in the instant situation. In re Sing's Petition, 163 F. Supp. 922 (D.C. N.D. Cal., 1958); Petition of Agustin, 62 F. Supp. 832 (D.C. N.D. Cal., 1958).

These three principles, together with the views expressed in Villarin v. United States, 307 F.2d 774 (C.A. 9, 1962), should result in rejection of the mechanical interpretation for which appellant contends United States v. National Marine Engineers' Ben. Assn., 294 F.2d 385 (C.A. 2, 1962), and affirmance of the decision below.

It is absurd to permit naturalization for aliens who have served 90 days or less and to deny it to a veteran of ten years' service. It is unreasonable to authorize naturalization for an alien illegally in the United States at the time of induction and to deny it to one who was born a national of the United States and who entered lawfully as appellee did in 1957.

The main purpose of the statutory provision was to require contact with and physical presence in the United States prior to naturalization. At the time of reenlistment appellee was in the United States. The statutory requirements of physical presence and enlistment are met. Reenlistment was encompassed within the term "enlistment." True, this did not precede his period of required military service. There is, however, nothing in the statute or Congressional history (as was the case of Tak Shan Fong) to show that military service had to follow enlistment in the United States rather than to precede it. No useful purpose or Congressional policy will be served by requiring the construction urged by the Government herein. Here too, there has been no interruption in military service as was the case of Villarin. Adoption of the Government's construction would result in rewarding a worthy applicant with

deportation proceedings rather than with naturalization. Had Congress envisaged a case such as this, it most certainly would have used more precise language specifically to grant naturalization benefits to appellee. The statutory language does not specifically preclude naturalization herein. To avoid an absurd and unjust result, to maintain the Congressional policy of rewarding aliens who offer to risk their lives for our country and to interpret the applicable statute liberally should result in affirmance of appellee's naturalization.

CONCLUSION

For the reasons noted above, it is respectfully submitted that the decision below be affirmed.

JACK WASSERMAN

DAVID CARLINER

Warner Building
Washington, D. C.

Attorneys for Appellee

SUPPLEMENTAL BRIEF FOR APPELLEE

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v.

ROLANDO REYES CONVENTO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK WASSERMAN

DAVID CARLINER

Warner Building
Washington, D. C.

Attorneys for Appellee.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,805

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SUPPLEMENTAL BRIEF FOR APPELLEE

Appellee urges that the petition granting him naturalization be affirmed for the additional reason that he is eligible to citizenship pursuant to the provisions of 8 U.S.C. 1439. Although this ground was not asserted below or relied upon by the District Court, it is nonetheless available to sustain the Court's ruling. Laughlin v. Eicher, 79 U.S. App. D.C. 266, 145 F. 2d 700, 703 (1944); United States v. Bazan, 97 U.S. App. D.C. 108, 228 F. 2d 455 (1955).

Section 328 of the Immigration and Nationality Act, 66 Stat. 249, 8 U.S.C. 1439, provides:

> "Sec. 328. (a) A person who has served honorably at any time in the Armed Forces of the United States for a period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.
>
> "(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that --
>
> "(1) no residence within the jurisdiction of the court shall be required;
>
> "(2) notwithstanding section 336(c), such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;
>
> "(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge."

The question here is whether the provisions of this section which eliminate both continuous residence and physical presence in the United States as a requisite for citizenship do not establish an exception to the requirement of Section 318 of the statute, 66 Stat. 244, 8 U.S.C. 1429, that naturalization petitioners be lawfully admitted to the United States for permanent residence.

The Immigration and Naturalization Service says no and has promulgated a regulation, 8 C.F.R. 328.1, 1962 supp., which makes explicit what Congress did not.

The legislative history of this provision, however, establishes that there is no warrant either for the regulation or for the Naturalization Examiner's conclusion here that no provision of the law permits the appellee's naturalization (App. 22).

The benefit for members of the Armed Forces which is set forth in Section 328 is derived from an antecedent provision in Section 324 of the Nationality Act of 1940, 54 Stat. 1149, 8 U.S.C. 724. That statute codified previously existing and divergent laws. It waived the five year residence requirement, and, significant here, eliminated the need for a filing of both a certificate of arrival, ibid, Section 324 (a), 8 U.S.C. 724(a) and a declaration of intention to become a citizen. The waiver of the latter two requirements removed the need for proof of lawful admission to the United States for permanent residence as a condition for citizenship. Section 329(b),

Nationality Act of 1940, 54 Stat. 1152, 8 U.S.C. 729. See United States v. Ness, 245 U.S. 319, 322-325 (1917), and In re Wieg, 30 F. 2d 418 (1929).

At the time of the enactment of the 1952 statute, a member of the United States Armed Forces with three years honorable service was, therefore, eligible to naturalization without prior residence and without proof of lawful entry.

This was the authoritative view of the Immigration and Naturalization Service following the enactment of the 1940 statute. See Section 957.331, Nationality Manual, Immigration and Naturalization Service, United States Department of Justice, 1944, p. 9052, which states that a petitioner under this section "is not required to establish that he was lawfully admitted to the United States for permanent residence".

Does the Present Statute Modify the Benefits Available to Members of the Armed Forces Under the 1940 Statute?

The language of the present statute originated in Section 328 of S. 716, which was introduced in the 82nd Congress by Senator McCarran following an exhaustive study of the immigration and naturalization laws, and an analysis and revision of a prior bill designed to codify such laws, S. Rep. 1137, 82nd Cong., 2nd Sess. pp. 2-3.

In its analysis of this provision, the Immigration and Naturalization Service advised Congress in Analysis of S. 716, 82nd Cong., prepared by the General Counsel, Immigration and Naturalization Service, No. 56190/113-A, Part II, Section 328.

"This section is designed to replace section 324 of the 1940 Act. It prescribes the conditions under which a person, who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, may be naturalized.

"This is one of the sections concerning which the Service is in doubt, particularly as to whether it is necessary for a petitioner thereunder to establish a lawful admission to the United States for permanent residence in order to be naturalized. It is to be observed that the petitioner need not have a residence in the United States, in the state, or within the jurisdiction of the court, and he need not show a physical presence in the United States. In view of these exemptions, the Service will probably be faced with the contention that the petitioner need not have been lawfully admitted to the United States for permanent residence. While subsection (b) requires compliance with the requirements of Title III (with specified exceptions), the Service would prefer that Congress should indicate directly whether or not it is necessary for the petitioner to establish a lawful admission for permanent residence."

Notwithstanding the recommendation of the Service, Congress enacted Section 328 unchanged from its original version in S. 716 and declared in its reports on the legislation that: "This provision in Section 328 of this bill carries forward substantially the provisions of existing law of the Nationality Act of 1940", S. Rep. 1137, supra, p. 42; H. Rep. 1365, 82nd Cong., 2nd Sess., p. 78.

This section is to be compared with Sections 329 and 330 of the statute, 8 U.S.C. 1440, 1441. In both of these provisions Congress made explicit the requirement that certain Armed Forces personnel and that seamen "be lawfully admitted to the United States for permanent residence" in order to be eligible for citizenship.

The familiar rule of statutory construction set forth in United States v. Atchison T. & S.F.R. Co., 220 U.S. 37 (1910), applies here, namely, where the legislature has imposed specified requirements in one part of a statute but not in another, the judiciary should not read the former into the latter.

The correctness of the construction which the appellee urges is underscored here by the further provision in Section 328 that the petitioner may be naturalized "without having been physically present in the United States for any specified period". 8 U.S.C. 1439. A requirement that a petitioner be lawfully admitted to the United States plainly renders nugatory the waiver of physical presence in the United States, and is contrary to the axiom that if possible every clause in the statute be given effect. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1931).

For these reasons it is submitted that the appellee is eligible for naturalization under Section 328 of the Immigration and Nationality Act, notwithstanding that he has not been admitted to the United States for permanent residence.

Respectfully submitted,

JACK WASSERMAN

DAVID CARLINER
Warner Building
Washington, D. C.

Attorneys for Appellee